SOME OF THE CAUSES OF CONFLICT BETWEEN EUROPE AND LATIN AMERICA

By George Winfield Scott, Ph. D.
University of Pennsylvania

The causes of conflict between Europe and Latin America are not at all new in principle. The recent clash between Venezuela and the European nations gave us a fresh combination of facts, but the principles of law and economy, over which the conflict arose, are as old as the Latin-American states.

The present dispute concerns the validity of certain pecuniary claims which are held by foreign individuals against the government of Venezuela. But indirectly involved in this dispute is also a question of territorial sovereignty. The small and uninhabited island of Patos, situated about three miles off the coast of Venezuela, is claimed by both Great Britain and Venezuela. It was supposed that when the boundary dispute between Venezuela and British Guiana was settled that this removed the last cause of territorial conflict between Europe and Latin America. The New World has had a vast number of boundary disputes. Sometimes they have been between American states and at other times between American states and European colonies. Wherever war has been the method of settlement the foreigner, like the subject, has suffered injury to person and loss of property. Happily as one boundary after another is determined this source of conflict between Europe and Latin America is removed. Furthermore, it is hoped from the arbitration treaties recently ratified or awaiting ratification, that boundary disputes will hereafter be settled by peaceful methods.

The material or economic facts which interest Europe and Latin America in each other are well known. Europe is an old country with a surplus population, with capital that seeks better investment and with manufacturers who are anxious for cheap raw materials and good markets. Latin America is a nearby continent with untold natural resources which await only capital and enterprise to prepare them for the innumerable utilities which promote the comforts of modern life. Europe has a temperate climate, while

a large part of Latin America is within the tropics. Civilized man has always sought the products of the tropics. But the modern developments in the means of communication, sanitation, etc., have eliminated many of the difficulties and dangers incident to the exploitation of the tropics. At the same time the modern industrial processes have increased the availability and multiplied the quantity of tropical products, thereby augmenting the desirability of tropical industry and trade on the part of European states.

On their part the Latin Americans are anxious to secure the very articles which Europe alone can at present furnish. Their solicitude for immigrants and capital is abundantly evidenced by the generous invitations they have ever extended to foreigners. Privileges have been offered which no nation could possibly carry out. Frequently they have been accepted by foreign speculators who had no real interest in the development of honest industry. But relying upon their powerful governments to protect them, these foreigners have become concessionaires to fat privileges. In spite of the known instability of many of the Latin-American governments, particularly those lying within the tropics, many Europeans have invested their capital in Latin-American states. They take the hazard on the chance that for a short period there will be large returns.

Let us consider for a while the more fundamental principles which govern the rights and obligations of the opposing nations. The recognition by Europe of the revolted colonies of Spain as independent sovereign states meant something—if international morality possesses any right to the title of "law." It was an acknowledgment that the Latin-American communities had adopted a civilized system of municipal or national law. Otherwise they would have been compelled to grant extraterritorial privileges, such as prevail in China, Turkey and Siam. It was an acknowledgment, too, that the Latin-American people possessed the governmental organization and power to enforce their national laws according to the standards demanded by the then-existing international law; that the foreigners and foreign property which came voluntarily within their jurisdiction were subject to the local laws and that the Latin-American countries as juristic persons of international law were entitled to the equal rights and subject to equal obligations enjoyed by other countries.

On the other hand, when the Latin-American communities

became states they undertook certain obligations. From the fact that a nation enjoys sovereign power over all persons and property within its territory, international law logically holds every nation *prima facie* responsible for all acts, committed therein, which invade the rights of other states, whether the offences are the acts of private persons or duly authorized government agents acting within the scope of their authority. The law assumes in the absence of proof to the contrary that all acts accomplished within the range of the state-will are either done or permitted by it.

The standard of justice and degree of protection which international law imposes upon nations in relation to the foreigners who voluntarily come within the range of the state-will is in a general way reflected by the standard which the national or municipal law of modern civilized states has set up for its own citizens and subjects. This happens from the fact that one independent state could not reasonably expect other equally independent states to concede rights and privileges to its subjects without itself making a like concession to their subjects when they should come within the range of its will. As a matter of comity, each state has by its national laws extended to foreigners those private rights which it was desirous should be extended to its own subjects who came within the jurisdiction of other states. And it may be safely said that what was originally granted as comity has now ripened into law.

Therefore, international law contemplates the existence of a national law consonant with modern civilized ideas of private right and so administered that the foreigner is able to obtain criminal and civil justice with a tolerable approach to equality as between himself and the subjects or citizens of the nation. To this extent the law seems clear. But the actual practice of the more powerful states in their relations with the weaker raises the question whether or not the foreigner (who is a subject of a powerful state) does not enjoy a more favorable position than the subject of a weak state which is suffering from intestine war or civil commotion. Over its own subjects a nation is absolutely supreme. The national law may deny all civil responsibility to them. It may treat them with flagrant injustice —considered from the moral standpoint.

However, let us assume that foreigners and foreign property, voluntarily domiciliated in the Latin-American states, are only entitled to that governmental protection and impartial justice which

these states are in the habit of administering to their own subjects. A denial of such protection and justice is considered in legal theory an injury to the nation of which that foreigner is a subject. Because every nation has a right to a continued existence and is accorded all remedies necessary to its self-preservation, that nation, the subject of which has been denied such protection and justice, enjoys at least the remedial right of interposition on his behalf. Whether the remedy of interposition will avail the foreigner anything in a particular case depends upon the standard of justice and protection which he is entitled to enjoy by the rules of international law, regardless of and apart from the national or municipal law of the nation which denies the civil responsibility. This standard can only be determined by the principles governing the actual occasions in which interposition has been successful.

Interposition is the diplomatic presentation by a nation of the claim of a subject against a foreign government with a view to induce by means of negotiation or arbitration a settlement of the claim. It differs from intervention in that it is confined to entirely peaceful remedies. When nations resort to reprisal, retorsion, "pacific" blockade or war in order to enforce a settlement of the pecuniary claims of their subjects they may be said to have intervened—they have committed a hostile act.

On principle, neither interposition nor intervention should be allowed by international law in the case of a foreigner, who has been denied the standard of protection and justice to which he is entitled, until he has exhausted in vain the remedies provided by the national law. Theoretically, this is so because it must be assumed from the sovereign nature of the state that the foreigner who voluntarily places himself within the range of the state-will undertakes to submit to a degree to its laws and administration. Furthermore, the dignity of the state and its high interests in the administration of justice are too deeply involved to allow a mere supposition to be entertained that there has been such a flagrant denial of justice on its part as to affect it with responsibility to a foreign state. Practically, there are at least two distinct reasons for holding that the remedies of the national law should be exhausted by the foreigner: First, to make certain that the denial of the requisite protection and justice was the deliberate act of the nation and not the mere wrongdoing of some minor governmental agency (such as an officer or

local government corporation). Second, if it was the deliberate act of the nation, to make certain that it is the sovereign will that the damage go unrequited.

The legal remedies open in the Latin-American states to the foreigner who has been injured by the government are practically the same as those provided by the countries of Continental Europe and slightly greater than those provided by the United States and Great Britain. Most nations now recognize that the activity of the government is twofold: In one capacity it is a public power maintaining peace and justice and regulating all the relationships within its boundaries. In another capacity it is a private corporation and, like any private person, subject to the civil liabilities of the private law. For damages done individuals in its public capacity no government permits itself to be sued, at least, as a matter of private right. However, all governmental activity is carried on through agents, and, as a general rule, they are personally responsible for the damage which they may commit without authority of law, or which arises from the non-performance or negligent performance of legal duties or from bad faith. Ordinarily, before the foreigner can appeal to the assistance of his government, he must exhaust the remedies afforded by the national law of the state which injured him. But where the damage is caused by the deliberate act of the highest public authority and no provision is made for redress, the foreigner has a right to seek the immediate interposition of his government. The seizure by Portugal of the Delagoa Bay Railway was an act of this character and the damage suffered by the English and American builders at once became an international claim.

Many of the claims against the Latin-American states arise from cruel and inhuman treatment, false imprisonment, forced loans, wanton destruction of property and pillage by the military, mob violence, etc. Such claims originate largely in times of civil commotion and international war. The principles which govern the responsibility of the state in such cases are comparatively simple. The state exists to promote justice, peace and civilization. The government must act in good faith and with impartiality as between subjects and foreigners. It must exercise reasonable diligence to apprehend and punish all persons who invade the private rights of foreigners. It must avoid cruel and savage punishments, at least, in the case of foreigners. Thus Sir Edward Thornton decided, as umpire of the

international commission of 1868 between Mexico and the United States, that Mexico must pay damages to those Americans in the Zerman filibustering expedition who had been treated by the Mexican authorities with severe cruelty. This is an extreme case because participation in a filibustering enterprise works a loss of national protection. Modern civilized law does not permit the mutilation and barbarous treatment of even an enemy.

Perhaps the greatest difficulty which besets the foreigner residing in a state disturbed by civil commotion is the maintenance of a strict neutrality. In those Latin-American states where revolution is the rule rather than the exception, the foreigner is constantly drawn into the maelstrom of strife. To cast his lot with one party means in international law the forfeiture of national protection. The failure of the European states to observe this principle of law is an important cause of conflict between the governments of Europe and Latin America. The European states are prone to overlook the unneutral acts of their subjects abroad and take up their alleged claims with all the force of a powerful state moved by deep national pride. Without doubt the home governments are imposed upon in this matter not only by their erring subjects, but by the resident consular and diplomatic agents.

When a government is temporarily unable to suppress an insurrection within its dominions, it is not responsible, as a general rule, for the damage which foreigners may suffer. It makes no difference whether the damage was caused by the insurrectionists or by the government itself in an effort to assert its authority. Strangers voluntarily domiciled abroad cannot expect a higher degree of protection than is enjoyed by the subjects of the state. States are not in the habit of recouping their subjects for losses which they have suffered in consequence of uncontrollable violence. Of course, states may do as France did after the German conquest of 1870—appropriate millions of dollars to reimburse those who have suffered from the ravages of war. But inasmuch as such national beneficence is purely an act of grace, foreigners cannot complain that they are unjustly discriminated against if they are not made recipients of the bounty.

In the matter of forced loans the foreigner has no ground for a claim if the tax is proportioned alike upon the property of subjects and foreigners. But international tribunals have uniformly held that

partiality in favor of the subject in the repayment of the forced loan is a cause for complaint. In the case of wanton destruction of property and pillage during military operations, the international arbitration commissions to which the United States has been a party have generally dismissed the claims unless the culpability of some high officer was shown.

However, states do not as a general rule hold themselves responsible to their subjects for damages which they may have suffered in consequence of the wrongful acts of government officers, even when the injury was inflicted in the regular line of duty. The private-law rule of *respondeat superior* has no application to the public law of Great Britain and the United States and only a limited application in Europe and Latin America. Thus Germany is the only state which permits herself to be sued for damages caused by the wrongdoing of her officers in cases of riot. The attitude of the United States has been to regard compensation in such cases as purely an act of grace, even under circumstances like the mob attack on the Chinese at Rock Springs, Wyoming, in 1885; on which occasion, it will be remembered, President Cleveland characterized the conduct of the Wyoming authorities as "a ghastly mockery of justice." So it happens that individuals may suffer severe losses and injuries and have no legal claim against the government itself. No nation guarantees either to its own citizens or to foreigners the administration of perfect justice. Nor is abstract justice demanded by international law.

Thus far we have discussed those claims which are tortuous in their origin. The claims which originate in contract play an important part in the conflict between Europe and Latin America. Bonds, guaranteed dividends on foreign investments, contracts for government supplies and public works, etc., have given rise repeatedly to pecuniary claims. In only one instance have the foreign bondholders recovered in claims presented to an international arbitration tribunal. The Venezuela and United States commission of 1885 made these awards. Other commissions have held that the term "claims" in the treaty establishing the tribunals was not broad enough to give them jurisdiction of claims originating in contract. The reason given was that states have as a general rule refused to protect those interests of subjects which arose from contracts with foreign states. The Venezuela commission took the ground that "a claim is none

the less a claim because it originates in contract instead of tort" and, conceding that states have heretofore refrained from presenting claims which were contractual in origin, it said, "we can perceive no reason why such a policy should not be departed from when arbitration is adopted as the method of finally adjudicating international claims."

The instruction of Lord Palmerston to the British representatives in foreign countries is often quoted as indicative of the law upon the subject. He said that the question whether the claims of English subjects originating in contracts with foreign states are to be a subject of diplomatic negotiation is "for the British government entirely a matter of discretion, and by no means a question of international right." This much might be said of any claim. Whether or not a state will undertake to collect the claims of its subjects against foreign states is "entirely a matter of discretion." To discourage foreign investment and keep capital at home, states have generally abstained from presenting contract claims. It is a matter of public policy. Fundamentally there is no difference in principle between wrongs done a subject through a breach of contract and other wrongs for which the state has been held responsible.

The rule that breaches of contract and tort create a liability for damage is a rule of private law. The position of the state in its exercise of sovereign functions is entirely beyond the sphere of private law. Therefore, the extent to which the state is liable to foreigners whose rights originated in private-law relations, must be considered from the point of view of the purpose for which the state exists. It must be borne in mind that the large debts of nations, due as they are to an indefinite number of creditors, all exist under the reservation that the nation shall be in a position to satisfy them, and the supreme authority of the nation, generally the legislature, will finally determine whether the nation is in that position. If the law of nations were otherwise the creditors of a state could assail its property with such diligence as to menace its existence. And the right to a continued existence is the most sacred prerogative of a state. The most which the foreigner has a right to expect in his private-law relations with the state is that his claims receive the same consideration which is given to similar claims of the subject. This is the rule which governs the dealings between the first-class powers.

The real, though not the most avowed, purpose of the recent

intervention of Germany in Venezuela was to collect claims which originated in contract between German subjects and the government of Venezuela. There were two principal contracts. One for 5 per cent bonds for which the Venezuela customs were pledged as security and on which the interest was four years in arrears. The other for 7 per cent dividends guaranteed by the Venezuela government to German subjects on the capital stock of a railway, built by them at an alleged cost of twenty million dollars. In addition to these contractual claims there were several others held by German and British subjects for the transport of troops, munitions of war, etc. These aggregated several million more dollars. From the principles already set forth one may draw his own conclusions as to the legal right of the powers to *force* the payment of such enormous contractual claims. The fact should be noted, too, that these claims arise from injuries to property owned by subjects who are not domiciliated abroad. A vast number of the pecuniary claims against Latin America originate in damage suffered by the, so to speak, absentee landlord. Resident foreigners are generally opposed to the use of violence by their government against the states wherein they are domiciled, because it injures their commercial interests by arousing native hostility.

The disposition of European states to exercise the remedial right of interposition and intervention on all occasions on behalf of their subjects or their property domiciled in Latin America and thereby to discount the remedies afforded to claimants by the national law of the Latin republics has tended to make the foreigner regard the laws and people of Latin America with surly contempt. The foreigner may present any sort of a cock-and-bull claim with considerable certainty that his government will take it up seriously. If this statement seems extravagant, glance through the reported proceedings of the arbitrations and mediations to which Latin-American states have been parties. Between themselves the so-called first-class powers would not think of undertaking to collect such claims. Not only is the original damage greatly exaggerated, but a high rate of compound interest is frequently added.

Of course, there are many cases in which the claimants have suffered losses. Some of them are wrongs for which no law provides a remedy (*damnum absque injuria*) and others are valid claims which should be paid. The problem is to distinguish the

legal from the illegal and the honest from the fraudulent. The method and procedure which prevail in the foreign offices and embassies of the various states are not calculated to perform this essentially judicial function. The difficulties of sifting the evidence and weighing the principles of law applicable to the issues in a particular case can best be met by the procedure of the courts. In these respects a claim against a government is not different from the claim of one private person against another. Besides, it is evident for several reasons hardly necessary to mention, that a judicial body in deciding on the merits of a claim is not so prone as an executive or legislative body to be influenced by personal motives of prejudice and political expediency.

It is impossible to find an instance in which one first-class power has ever made a show of force—resorted to the remedial right of intervention—in order to collect the pecuniary claims which its subjects held against another first-class power. Between such states claims are settled by negotiation or arbitration, *i. e.*, through the peaceful remedy of interposition. This is eminently proper. Why should it be departed from in cases to which a weak state is a party defendant? The Latin Americans realize that they have been imposed upon and naturally they feel bitter. This accounts for the long discussion which M. Calvo, the Argentine publicist, gives to the subject of pecuniary claims in his scholarly work on international law. He says: "A cette question, se rattachent les graves et nombreux conflits que la protection des étrangers a fait surgir entre les grandes puissances européennes et les gouvernements du Nouveau Monde. . . . La règle que dans plus d'une circonstance on a tenté d'imposer aux Etats americains, c'est que les étrangers méritent plus de consideration, des égards et des privilèges plus marquis et plus étendus que ceux accordés aux nationaux mêmes du pays où ils resident."

But it must not be thought that the Latin-American states are blameless. They are the cause of their own misfortune. The states within the tropics have shown little or no capacity to maintain civilized law. Basking under the kindly, not to say sentimental, protection of the Monroe doctrine they have more than once repudiated their just obligations as states and defied the powers. Considering the great economic possibilities which this territory possesses for Europe, the wonder is that the states of the Old World have been so

patient. The tropics are to them a commercial necessity, and law and order are indispensable to the maintenance of commerce and industry. The standards of law and order which meet the needs and satisfy the demands of the Europeans are those which originated in Europe. To secure the rule of law within the tropics at other points on the globe, the commercial powers have found it necessary to establish colonies. Coupled with this necessity, every first-class modern state is moved by the ideal of economic unity. The question of the hour is how long will Europe tolerate the violence and misrule which have ever prevailed in tropical America. The United States as a new country has not the surplus population nor capital which is absolutely necessary for the industrial development of American tropics. On the other hand, the Europeans will not dare to risk themselves or their property to the care of the utterly incapable and irresponsible mob which at present inhabits tropical America.

The United States, as the friend and well-wisher of the Latin-American republics, has a responsible and delicate part to play. It must be careful to avoid any "dog in the manger" policy which may thwart the establishment of honest industry among the Latin Americans by cutting off from them the population and capital which Europe alone can at present furnish. It must realize that political and civil liberty are not every man's possession for the asking. People attain liberty through ages of social and self discipline. It does not consist in a governmental name, but, like heaven, indicates a condition of mind. It is a trained will—the highest product of civilization, and not a thing to be conjured with by the use of the term "republic." The United States must issue its Monroe-doctrine ultimatums with great caution and upon careful consideration, not only because of the economic righteousness of European interest in Latin America, but because our powerful and successful republic is the model which the Latin Americans consciously and unconsciously follow. The recognition by our government of the rule of law and the binding force of international obligations cannot fail to impress them. It is to be hoped that the Senate will ratify the treaty, now submitted to it, providing for the arbitration of all pecuniary claims which may be in dispute between the United States and the Latin-American states.

No doubt the hostile methods at times employed against the Latin-American states by Europe and the United States in the col-

lection of fraudulent and illegal claims has tended to cultivate a disrespect for law on the part of the Latin Americans. Formerly it was thought necessary in national law to incarcerate and otherwise severely punish the delinquent debtor. The cessation of harsh methods (long advocated before adopted) has been followed by a decrease in the number of worthless debts and many other economic advantages to the community. Would not the adoption of a similar policy toward the Latin Americans be followed by the same happy consequences? Foreign investments would then be made only in those countries which manifested the ability to maintain peace and furnish such domestic remedies against themselves in their own courts as promised justice. The other Latin-American countries would languish from the lack of capital and industry, and perhaps spurred by the success of their neighbors to a sober political thought, it would help their society to co-operate in the establishment and maintenance of the rule of civilized law.